87-1762

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1987

No. _____.

JOHN E. ELLIS,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

Petition for a Writ of Certiorari to the Appeals Court For the Commonwealth of Massachusetts.

Thomas C. Troy,
Law Offices of Thomas C. Troy
& Associates, P.C.
One Pope Street,
Wakefield, MA 01880
(617) 438-1616

QUESTION PRESENTED

1. Was Petitioner denied his right to Due Process of Law under the Fifth Amendment to the United States Constitution on grounds that his tender of guilty pleas to three felony indictments was not voluntarily and knowingly given when, during the change of plea hearing, Petitioner refused to admit that he harbored an intent to murder and kill the victim, whereupon the trial Court called a five minute recess, during which recess defense counsel erroneously represented to Petitioner that he faced a maximum split sentence of not more than five nor less than three years at State Prison and that Petitioner was a potential candidate for a suspended sentence, and that defense counsel accordingly

instructed Petitioner to admit that he intended to murder and kill the victim, and when the plea hearing resumed immediately following the five minute recess, the trial Court again inquired of Petitioner if he intended to murder the victim, and Petitioner requested permission to speak with defense counsel, following which Petitioner indicated that he did intend to murder the victim, and the trial Court accepted Petitioner's change of plea without further inquiry on the element of intent?

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Petition for a Writ of Certiorari to the Appeals Court For the Commonwealth of Massachusetts.

The Petitioner, John E. Ellis, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Massachusetts entered in the above-entitled case on February 3, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals of Massachusetts is unreported although the decision is reported at 25 Mass. App. Ct. 1112. The opinion is set forth in the Appendix. The opinion of the Superior Court of Massachusetts, Middlesex County Division, is unreported and is reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals of Massachusetts was entered on February 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3), since a right has been specially set up and claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which this Petition involves is as follows:

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Factual Statement

At trial, the complaining witness, Katherine Tennihan, testified that she met the Petitioner in a parking lot at a

nightclub in Malden, Massachusetts, on the evening of July 28, 1985. After a short discussion, Ms. Tennihan agreed to go for a drink with Petitioner at the apartment of Petitioner's brother located in Wakefield, Massachusetts. Upon arriving at the apartment and after some conversation, Ms. Tennihan and Petitioner found themselves on the bed in the bedroom, Petitioner having undressed himself. Petitioner expressed an interest in having sexual intercourse with Ms. Tennihan; however, Ms. Tennihan expressed some reservation as she had no contraception. The two agreed to see one another at some other time because it was getting late. During this conversation, Petitioner put his clothes on; thereafter, Ms. Tennihan went to the bathroom and stayed there several minutes. She did not see Petitioner upon her return to the bedroom.

Ms. Tennihan further testified that Petitioner appeared in the bedroom and accused her of stealing a sum of money. Petitioner demanded that Ms. Tennihan remove some of her clothing, which she did. Petitioner then placed his fingers in her vagina and rectum, presumably looking for the money. Petitioner then beat Ms. Tennihan, called her abusive names, threatened to kill her, and choked her with a pillow. Eventually, the police arrived at the apartment and Ms. Tennihan was transported to a hospital by emergency medical technicians.

On September 11, 1985, a Middlesex County Grand Jury returned five indictments against Petitioner, to wit: aggravated rape (Indictment No. 85-2514); assault with intent to murder (Indictment No. 85-2515); assault and battery by means of a dangerous weapon (Indictment No. 85-

2516); possession of marijuana (Indictment No. 85-2517); and kidnapping (Indictment No. 85-2518).

Petitioner retained private counsel. Defense counsel advised Petitioner that if convicted, Petitioner faced a maximum sentence of three to five years. At no point during these discussions did defense counsel discuss the possibility of pleading guilty to lesser charges, nor did defense counsel inform Petitioner that a conviction for aggravated rape exposed him to a potential life sentence.

Petitioner's jury-waived trial began on January 21, 1986, before Justice Hiller B. Zobel. On January 22, 1986, during the second day of trial, the trial judge called defense counsel and the prosecutor to the side bar and indicated that he was baffled as to the nature of the defense to this case. The trial court then called a recess, and defense counsel discussed with

Petitioner the possibility of changing his plea. Petitioner informed defense counsel that he would not plead guilty because he did not intend to murder Ms. Tennihan. Defense counsel responded that unless Petitioner pled guilty, he faced imprisonment for life if convicted of aggravated rape. This was the first time Petitioner learned that the aggravated rape indictment provided for a maximum penalty of life imprisonment.

Following this recess, Petitioner tendered guilty pleas to three of the five indictments; namely, to so much of the aggravated rape charge as alleged indecent assault and battery; to assault with intent to murder; and to assault and battery by means of a dangerous weapon. During the change of plea colloquy with the trial court, Petitioner refused to admit that he intended to kill or murder

Ms. Tennihan by covering her face with a pillow. At that point, the trial court called for a five minute recess during which Petitioner and defense counsel conferred.

During this recess, defense counsel advised Petitioner that he had to answer "yes" to the question of intent to murder and kill; otherwise, the trial would continue. Petitioner again asked defense counsel "what he was looking at", and defense counsel responded, "at the most three to five years and there is a good chance you can get a suspended sentence, so answer the question 'yes'".

The plea colloquy resumed, and Petitioner admitted that he intended to kill Ms. Tennihan; however, when asked by the trial court whether he intended to murder Ms. Tennihan, Petitioner requested leave to confer with defense counsel. After conferring with counsel, Petitioner

admitted that he did intend to murder Ms. Tennihan, and the court accepted his pleas.

On March 7, 1986, the trial court sentenced Petitioner to a term of imprisonment of not more than ten nor less than nine years at state prison on the indictment charging assault with intent to murder. On the remaining two indictments, the trial court imposed concurrent sentences of not more than five nor less than three years at state prison, said sentences to be served consecutive to the nine to ten year sentence imposed for assault with intent to murder.

Following the sentencing hearing, Petitioner retained new counsel and, on April 22, 1986, Petitioner filed a motion for a new trial, seeking to withdraw his guilty pleas on grounds that these pleas were not knowingly and voluntarily

entered. Additionally, Petitioner filed a motion to revise and revoke his sentences, arguing that his actions on the day of the incident were not voluntary acts but the result of diminished capacity and that, accordingly, the sentences that were imposed were unduly harsh.

HOW THE FEDERAL QUESTION AROSE

Petitioner first raised the federal question here sought to be reviewed in the Superior Court Department, Middlesex County Division, by way of a motion to revoke his guilty pleas and for a new trial which was filed approximately six and one-half weeks after the trial Court imposed sentence. The trial Court denied Petitioner's motion to revoke guilty pleas and order new trial, ruling that despite whatever assurances trial counsel made to Petitioner with respect to sentencing,

Petitioner's guilty pleas were nevertheless offered voluntarily with sufficient awareness of the consequences. The Appeals Court of Massachusetts affirmed the Superior Court on grounds that during the hearing on Petitioner's change of pleas, the trial judge informed Petitioner of the maximum sentence for each offense to which he pled guilty, that the trial judge apprised Petitioner that the Court was not bound by the recommendation of the prosecutor, and that the trial judge stated that the Court was empowered to impose sentences in excess of those recommended. The Appeals Court further found that the pleas colloquy was probing.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this case squarely presents the question

whether defense counsel's specific but erroneous assurance as to the maximum sentence that a court would impose renders a guilty plea involuntary.

This Court in the landmark case of Boykin v. Alabama, 395 U.S. 238, 243 (1969), held that "(s)everal federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Malloy v. Hogan, 378 U.S. 1. Second, is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145. Third, is the right to confront one's accusers. Pointer v. Texas, 380 U.S. 400." A plea of guilty is valid only when the accused offers it voluntarily, "with sufficient awareness of the relevant circumstances and likely

consequences", Brady v. United States, 397 U.S. 742, 748 (1970), and with the advice of competent counsel. Id. at 758. "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack." Machibroda v. United States, 368 U.S. 487, 493 (1962). An affirmative showing of voluntariness must appear on the record when the defendant offers a plea of guilty. Boykin v. Alabama, supra, 395 U.S. at 243-244.

The Petitioner contends that the Appeals Court of Massachusetts erroneously agreed with the trial Court that Petitioner entered his guilty pleas intelligently, freely and voluntarily. Petitioner asserts that his guilty pleas were invalid as these pleas were induced by erroneous advice given by defense

counsel as to the what sentence the trial Court would impose. Further, the Massachusetts Appeals Court erred in concluding that "the pleas colloquy was very probing." (4a).

In its Memorandum and Order with respect to Petitioner's motion to revoke his guilty pleas, the trial court cited certain federal cases for the proposition that defense counsel's "bad guess" as to sentencing does not constitute grounds to invalidate a plea, Little v. Allsbrook, 731 F.2d 238, 241 (CA4 1984), nor does a defendant's "erroneous expectation", based upon his attorney's "erroneous estimate", render a plea involuntary, ibid.; see also United States ex rel. LaFay v. Fritz, 455 F.2d 297, 302-303 (CA2 1972). (26a-30a). The trial court emphasized that defense counsel's representations to Petitioner did not include any statement that the Court had promised or agreed to impose a

three-to-five year sentence. Further, the trial court characterized defense counsel's advice to Petitioner as "amount(ing) to no more than counsel's hope for a particular disposition." (29a). The Appeals Court essentially adopted this reasoning of the trial court. (3a-4a).

However, the record clearly shows that trial counsel's advice amounted to much more than a "bad guess" or "erroneous estimate". In fact, trial counsel unconditionally guaranteed Petitioner that the most severe sentence the trial court would impose would be a three-to-five year prison term. Petitioner, in his affidavit in support of his motion to revoke his pleas, asserted that during the five minute recess which the trial judge called during the pleas colloquy, Petitioner inquired of trial counsel as to what he was "really looking at." Trial counsel

responded, "at the most three to five years and there is a good chance you can get a suspended sentence, so answer the questions yes."

Under these circumstances, Petitioner's pleas of guilty were not offered knowingly, voluntarily and intelligently, as they were induced by trial counsel's erroneous representations concerning the maximum sentence the court would impose. Trial counsel offered Petitioner a guarantee, not a prediction. "Certainly, if an attorney recklessly promises his client that a specific sentence will follow upon a guilty plea, or otherwise unfairly holds out an assurance of leniency in exchange for a confession of guilt, the question may arise whether such assurances were coercive, or whether such representation may be deemed constitutionally ineffective." Wellnitz v. Page, 420 F.2d 935, 936 (CA10, 1970).

Accordingly, the guilty pleas offered by Petitioner were invalid.

Further, the pleas colloquy was deficient with respect to the trial court's inquiry of the element of intent necessary to support the charge of assault with intent to murder. The colloquy between the trial court and Petitioner following Petitioner's refusal to admit to intending to murder and kill the victim was not a real probe of Petitioner's mind, and as such, the colloquy violated the requirements of due process within the meaning of Boykin v. Alabama, 395 U.S. 238, (1969), and its progeny.

The record shows that during the colloquy, Petitioner denied that he intended to kill, let alone murder, the victim. Petitioner stated that his actions on the evening in question were done with the intent of scaring the victim

so that she would return some $1,600.00 that Petitioner believed she had stolen from him. Upon these statements, the court called a recess, which consumed merely five minutes. The colloquy resumed, and the following exchange took place:

Q Did you intend to kill her?

A Yes, sir.

Q Did you intend to murder her, that is to say, kill her with malice?

A Could I ask to talk to my attorney for a minute, please?

THE COURT: Mr. Champa, go up to the side bar. Mr. Champa.

MR. CHAMPA: Yes, sir.

(Pause.)

If I may, Judge, one second?

(Pause.)

The Court continue, please.

Q What is your answer to my question?

A Yes, sir.

.....

Petitioner contends that under these circumstances, where he initially refused to admit an intent to kill, and following a five minute recess, he admitted to an intent to kill but requested to confer with counsel upon the court's question with respect to an intent to murder, that the trial court was duty bound to make inquiry as to Petitioner's sudden change of mind, particularly, since the trial court had evidence before it that at the time of the acts alleged in the indictments, Petitioner was under an extreme influence of alcohol and had consumed marijuana. Additionally, the record is silent on whether the trial court informed Petitioner as to a definition of murder, or malice.

The failure of the trial court to

further probe Petitioner relative to intent violated due process. Henderson v. Morgan, 426 U.S. 637 (1976). In this case, the record is clear by Petitioner's repeated balking at admitting to harboring an intent to kill and murder that, with respect to the indictment alleging assault with intent to murder, Petitioner "falsely condemn(ed)" himself by his plea. Brady v. United States, 397 U.S. 742, 758 (1970).

Since the vast plurality "of the criminal convictions in this country rest on pleas of guilty," Id., at 752, and the question raised by the instant Petition is of great public importance, this Honorable Court should resolve the question here presented for direction to the various State Courts and lower Federal Courts.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS C. TROY,
Law Offices of Thomas C. Troy
& Associates, P.C.
One Pope Street,
Wakefield, MA 01880
(617) 438-1616

COMMONWEALTH OF MASSACHUSETTS.
Appeals Court for the
Commonwealth,

At Boston, Februay 3, 1988

In the case of

Commonwealth

vs.

John E. Ellis

pending in the Superior
Court for the County of Middlesex

Ordered, that the following entry be made in the docket; viz.,-

The orders denying the defendant's motions for leave to withdraw his pleas and to revise his sentences are affirmed.

By the Court,

Nancy Turck Foley,
Clerk

February 3, 1988

NOTE:

The original of the within rescript will issue in due course, pursuant to M.R.A.P. 23.

APPEALS COURT

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NO. 87-600

COMMONWEALTH

vs.

JOHN E. ELLIS

MEMORANDUM AND ORDER

During his jury-waived trial, the defendant pleaded guilty to indecent assault and battery (G.L.c. 265, § 13H) on an indictment charging aggravated rape, assault with intent to murder (G.L.c. 265, § 15), and assault and battery by means of a dangerous weapon (a pillow). G.L.c. 265, §15A.

Shortly after he was sentenced, the defendant, represented by new counsel, filed a "motion to revoke defendant's guilty pleas and order new trial" which alleged that the pleas had not been

entered into freely and understandingly (A. 25). The defendant also filed a timely motion to revise his sentences which, when read in conjunction with its supporting memorandum, alleged that the judge "was not fully appr[]ised of the impairment of the defendant[']s cognitive abilities at the time of the incident" (A. 69). Both motions were argued together during a hearing at which no evidence was taken, and both denied (A. 4).

1. The motion to withdraw the pleas and for a new trial was properly denied for essentially the reasons spelled out by the judge in his comprehensive memorandum and order concerning this motion. See A. 10-21. See also Commonwealth v. Morrow, 363 Mass. 601, 606-607 (1973); Commonwealth v. Perry, 389 Mass. 464, 469-471 (1983).

It appears from the transcript of the hearing on acceptance of the pleas that the defendant was advised of the maximum sentence for each offense to which he pleaded, that the judge did not intend to be bound by any recommendation which might be made by the prosecutor, and that the judge had the power to impose sentences in excess of those recommended. We think it implicit in the denial of the motion to withdraw the pleas that the judge found that the defendant understood all the foregoing. We add that the pleas colloguy was very probing, going well beyond the questions suggested in Smith, Criminal Practice and Procedure § 1238 (2d ed. 1983). Contrast Commonwealth v. Fernandes, 390

Mass. 714, 717-721 (1984).

2. The sentences were all within the statutory limits. See Commonwealth v. Knight, 392 Mass. 192, 196 (1984). Compare Tr. 232-233 with G.L.c. 265, §§ 13H, 15, 15A. Consecutive sentences were appropriate here, given the defendant's several independent acts against the victim. See generally Commonwealth v. Pennellatore, 392 Mass. 382, 390-391 (1984). Recognizing that he was exceeding the sentencing guidelines, the judge put on the record the reasons for the sentences which he imposed (Tr. 230-232). He had previously requested a psychiatric evaluation of the defendant "for general purposes, and also, but not exclusively, for guidance to the court in determing whether or not the defendant may be a sexually dangerous person" (Tr. 205).

Trial counsel, in arguing on disposition, suggested that the judge had seen reports from one or two psychiatrists (M.T. 12-13). There was no abuse of discretion in denying the defendant's motion to revise the sentences.

Upon consideration of the record appendix, the transcripts which have been filed with and submitted to the court, the briefs and the arguments of counsel, it is ordered, under the provisions of Rule 1:28 of this court, that the orders denying the defendant's motions for leave to withdraw his pleas and to revise his sentences be, and the same hereby are, affirmed.

By the Court (Grant,
Cutter & Armstrong, JJ.)

Nancy Turck Foley,
Clerk

Entered: February 3, 1988

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS SUPERIOR COURT
CRIMINAL NOS.
85-2514/18

COMMONWEALTH

V. MEMORANDUM AND ORDER

JOHN E. ELLIS

MEMORANDUM

Facts

Defendant, a forty-year-old pipefitter with a high school education, represented by an experienced attorney on retainer, faced indictments for: assault with intent to murder; assault and battery with a dangerous weapon; possession of marijuana; kidnapping; and aggravated rape.

Upon Defendant's indicating a desire to waive his jury right, the Court conducted an extensive in-court, on-the-record colloquy with Defendant

and his counsel, and accepted his waiver.

The Commonwealth having elected not to go forward on the drug and kidnapping indictments, evidence as to the remaining charges commenced.

The witnesses were credible, the testimony explicit and full. Besides the complainant, the Court heard the physician who examined her immediately after the incident (and who took photographs of her condition--which the Court viewed); the tenant of the apartment immediately below that in which the government alleged that the crimes had occurred; the tenant of the apartment next door; and the police officer who responded to the downstairs neighbor's call.

Taken in a light which most favored Defendant and despite vigorous

cross-examination by Defendant's counsel, the evidence which the Court heard warranted a trier's regarding itself satisfied, beyond a reasonable doubt, of the following facts:

> Defendant, having picked up the complainant at a nightclub, took her (with her consent) to an apartment where, after inconclusive, but in any event non-criminal, sexual activities, he accused her of stealing $1600 in cash which belonged to him and which he had left somewhere in the apartment.
>
> Upon the complainant's denying any knowledge of the money, Defendant, a large man, plunged into a

unilateral orgy of sadism and uncontrolled violence. He punched her repeatedly, battering her face and knocking out a tooth. He attempted to strangle her; he bent her thumb backward until the ligaments tore; and he attempted to smother her, first with a pillow, then with a bedspread, all the while shouting--in words or substance: "I'll kill you...I'm going to kill you and put you alongside the road."

For as long as the complainant could speak, she protested her innocence. Unpersuaded, Defendant continued his violent course

until the police entry interrupted him. Ironically, the first officer on the scene promptly located the entire wad--in the Defendant's own toilet kit.

During the second day's testimony, the Court, at a side-bar conference with both counsel, said:

> I don't want to ask the defendant for anything the defendant doesn't want to tell me, but I must confess to you I am mystified by this case. What is the nature of the defense I should be looking for, or do you wish to hold back until--
> [Tr. 180]

After further discussion [Tr. 183], during which the Court specifically advised counsel of its reluctance to go too deeply, "because I am in the middle of trying this case and I don't want to get into anything further," the attorneys raised the possibility that

Defendant would tender a plea to a portion of the pending charges.

The Court responded:

> I want you to know the circumstances under which I would take that kind of a plea, and that is an open plea, no recommendation; that I am for the purposes of this plea, I am an A [sic] judge, which means I would reserve all options. So that the defendant--the government can make a recommendation if it wants, but I'm not bound by the recommendation. [Tr. 183-184]

Both counsel expressed explicit understanding.

Additional colloquy between counsel and the Court followed, during which the Court said:

> Now, the question is: is the Commonwealth prepared to accept [the plea arrangement which Defendant ultimately offered] without regard to what the Commonwealth is going to say at the time of disposition; with the understanding that the Commonwealth will have, uh, free rein on recommendation, and the Court is, for this purpose a 12A [sic] judge;

> that is to say, th Court isn't limited by any recommendation the Commonwealth may make? It's totally open, as though the defendant had been convicted.
> [Tr. 186]

Thereafter, following a private conference between Defendant and his attorney, Defendant offered to plead Guilty: to so much of the indictment for aggravated rape as alleged indecent assault and battery; to the indictment for assault with intent to murder; and to the indictment for assault and battery with a dangerous weapon. When the Assistant Clerk asked Defendant, with respect to the indictment for aggravated rape: "[D]o you at this time wish to retract your plea of Not Guilty?" Defendant personally answered: "Yes, guilty to that part of the offense [sic] that alleges indecent assault and battery" [Tr. 187-188].

The government indicated a willingness to proceed, an an extensive plea colloquy followed between the Court and Defendant (under oath) [Tr. 188-202]. At one point [Tr. 190], the Court asked the Assistant District Attorney: "Now, am I correct in my understanding, Ms. Lynch, that there has been no agreement contingent on the plea?" The Assistant District Attorney replied: "None whatsoever."

The Court immediately addressed Defendant:

> Now, Mr. Ellis, I want you to understand that the government may make a recommendation in the course of the proceedings.... If I accept your plea, I won't impose sentence right away; I never do. I will wait for further information, partiularly a probation report, [a] memorandum from the government, [a] memorandum from your lawyer, Mr. Champa, together with letters of recommendation, or any material that is

> appropriate for a judge to consider on sentencing....
>
> And then at the day of sentencing, Ms. Lynch will address me, and Mr. Champa will address me, and you'll have opportunity, too, if you wish to address me; and [the victim] by law is entitled to address me.... [Tr. 190-191]

Defendant having affirmatively indicated his understanding, the Court told him [Tr. 191]: "I want you to know that I am not bound by any recommendation given by Ms. Lynch, Mr. Champa, or anybody else. Do you understand that?" Defendant replied: "Yes, sir."

> [The Court] that means I can sentence you to the maximum sentence that each of the penalties [sic] involve. Do you understand that?
>
> [Defendant] Yes, sir.

[The Court] I'll go over with you in a little while what the maximum is, but I want you to understand, in pleading guilty, you are in a very real sense throwing yourself on the mercy of the Court. Do you understand that?

[Defendant] Yes, sir.

[The Court]...[I]f at any point in time now you decide that you do not want to plead guilty, all you have to do is say so, and the trial will resume. Do you understand that?

[Defendant] Yes, sir. I do, sir. [Tr. 191-192]

Later in the colloquy, the Assistant District Attorney, at the

Court's request, stated the respective maxima for the various offenses to which Defendant was offering a Guilty plea [Tr. 193]. The Court, after instructing Defendant that it could impose consecutive sentences, explictly told him [Tr. 194]: "So, putting the maximum[s] together, we are talking about a state prison maximum sentence of 25 years. Do you understand that?" Defendant answered, "Yes."

Still later, Defendant indicated a disinclination to amit an intent to murder. He conceded [Tr. 197] that he had told the victim, "I'll kill you," or words to that effect, but suggested that he "said it to threaten." He also admitted [Tr. 197] saying, in words or substance, "I will kill you and put your body on the road." He said [Tr. 196] he had covered the victim's face with a

pillow, but "I did it to muffle the scream, not to try and, you know, kill her." He said [Tr. 197] he thought he used the bedsheet or coverlet "to wipe up the blood," but without "intentions to smother her with it."

At this point, the Court told Defendant [Tr. 198]:

> I'll take a recess and you talk with Mr. Champa, and you tell him what you want to do. I tell you, it does not make any difference to the Court; it's entirely up to you. But when a man pleads Guilty, I cannot accept his plea unless he admits to the acts that he's been accused of. He has no obligation to admit to them; and the purpose of the trial, if a man does not admit to allegations, is to see if the allegations can be proved beyond a reasonable doubt.
>
> Now, you say that you admit to everything, except an intent to murder. You said that, and perhaps maybe on reflection, you will wish to maintain that; or perhaps on reflection you'll wish not to.

> But it's entirely up to you. But I think I'lll declare a recess so you can have a chat with Mr. Champa.

After the recess, Defendant admitted [Tr. 199] that he had said to the victim, "I'll kill you," and "I will take you and dump you by the road." He admitted that he had been very angry and that his hands had been on the victim's throat. He said that when the police knocked on the door, "I think I was slapping her." He admitted [Tr. 199] that he had intended to kill the victim; and (after conferring with his attorney) he further admitted [Tr. 200] that he intended to murder her.

Thereafter, Defendant specifically agreed [Tr. 201] that he had had sufficient time to discuss his case with his attorney; and that the attorney had acted in Defendant's best interests and

had fairly represented him. Defendant then stated separately with respect to each of the crimes of which he stood accused [Tr. 201-202] that he was pleading Guilty because he was guilty--and for no other reason.

The Court then explicity found that in each instance Defendant had "changed his plea to Guilty willingly, freely and voluntarily, with knowledge of the consequences." On the basis of the findings and the lengthy proceedings which underlay them, the Court accepted the several changes of plea [Tr. 202].

Some six weeks thereafter, having received memoranda from the Commonwealth and from Defendant's counsel, as well as a victim impact statment in writing and a full Probation Department pre-sentence report, the Court conducted a disposition hearing. Both the Assistant

District Attorney and Defendant's counsel spoke; the victim addressed the Court (excerpting her trial testimony); and Defendant, afforded a right of allocution, declined to exercise it.

The Court imposed the following sentences to MCI Cedar Junction: For assault with intent to murder, 9-10 years; for assault and battery by means of a dangerous, 3-5 years from and after; for indecent assault and battery, 3-5 years concurrent with the from and after sentence. The concatenated punishment resulted in a sentence-equivalent with a minimum of 12 years and maximum of 15 years.

Aware that this result, although less than the government's recommendation, exceeded the Superior Court guidelines, the Court stated its reasons for the sentence, on the record.

A transcript of these remarks, marked "Exhibit A", is annexed to this Memorandum and Order.

Now, represented by new counsel, Defendant has filed a Motion to Revise and Revoke, as well as a Motion to Revoke Defendant's Guilty Pleas and Order a New Trial. Supported by affidavits of Defendant and his wife, the Motions and the accompanying comprehensive Memorandum of Law raise one central issue: Did Defendant so rely upon his lawyer's misrepresentation as to the probable consequences of pleading guilty that he changed his plea neither voluntarily nor with sufficient awareness of the consequences?

Discussion

The Defendant's affidavit makes three pertinent points: (1) He pleaded Guilty because his attorney persuaded

him that he ought to; (2) Part of the basis for his agreeing to change his plea was the attorney's assurance that he would receive a sentence no greaterthan "three to five years" [Ellis Affid. Paras. 5, 9]; and (3) When the Court questioned him during the plea colloquy, he gave "Yes" or "No" answers, in accordance with the way he "thought" the questions "should be answered" [Ellis Affid. Para. 19].

Assuming the truth of these assertions, the Motion and the supporting papers do not raise any issue requiring an evidentiary hearing.

The Court must treat a postconviction motion to withdraw a plea as a motion for a new trial, Commonwealth v. DeMarco, 387 Mass. 481, 482 (1982), to be granted "only if it appears that justice may not have been

done." ibid., quoting Mass. R.Crim.P. 30(b). The burden is on Defendant not only to meet that standard, but to come forward "with a credible reason which outweighs the risk of prejudice to the Commonwealth" inherent in allowing a post-sentencing plea withdrawal, id. at 486.

Although when a plea was induced by a bargain, a defendant is entitled to a hearing, United States v. Scharf, 551 F.2d 1124, 1129 (8th Cir. 1977), especially if he claims that counsel misinformed him as to the prosecutor's promise, United States v. Williams, 536 F.2d 247, 248-249 (8th Cir. 1976), a hearing is not mandated when the record clearly shows full change-of-plea colloquy. Under those circumstances, and when, as here, the only claim is that counsel innacurately predicted the

sentence, a hearing is unnecessary, Masciola v. United States, 469 F. 2d 1057, 1059 (3d Cir. 1972).

Dissatisfaction with a sentence is not grounds for invalidating a guilty plea, Commonwealth v. Morrow, 363 Mass. 601, 606 (1973). Defendant argues that his expectation in pleading guilty was that he would receive no harsher a sentence than three-to-five-years, and that he formed this expectation entirely on the basis of his lawyer's assurances. Neither the expectation nor its predicate are grounds for permitting plea-withdrawal, Masciola v. United States, supra, at 1058; United States v. Crusco, 536 F.2d 21, 24 (3d Cir. 1976).

"A guilty plea to be intelligently made does not require that all advice offered by the defendant's counsel withstand retrospective examination,"

id. at 607. Defendant here knew he was exposed to a life sentence. (Although he states he did not learn this until the Assistant District Attorney recited the maxima during the plea colloquy [Ellis Affid. Para. 14], he also concedes that he knew about the life-sentence possibility before the colloquy even started [Ellis Affid. Paras. 9, 10].)

Whatever his counsel may have told him, the record is clear on two crucial points: (a) The attorney never told Defendant that the Court (or anyone else) had promised or even agreed to impose the three-to-five-year sentence--or any particular sentence; and (b) The Court told Defendant, in terms as clear as the English language permits, that it was "not bound by any recommendation given by [the government,

Defendant's counsel], or anybody else" [Tr. 191]; that it could "sentence [Defendant] to the maximum sentence that each of the penalties [sic] involve" [Tr. 191]; and that "in pleading guilty, you are in a very real sense throwing yourself on the mercy of the Court" [Tr. 192].

Defendant may well have been wavering in his decision to plead, burdened by pressures intrinsic to his situation; those facts do not mean--or under the circumstances of this case even suggest--that the pleas were involuntarily or unintelligently made, Commonwealth v. Cepulonis, 9 Mass.App. 302, 311 (1980).

An attorney's "bad guess" as to sentencing does not justify invalidating a plea, Little v. Allsbrook, 731 F.2d 238, 241 (4th Cir. 1984). A defendant's

"erroneous expectation", based on his attorney's "erroneous estimate", likewise does not render a plea involuntary, ibid.; see also, United States ex rel. LaFay v. Fritz, 455 F.2d 297, 302-303 (2d Cir. 1972).

Indeed, even if counsel were said to have erroneously indicated that the Court would not sentence higher than the government's recommendation, the plea would still stand, Little v. Allsbrook, supra, at 242. The situation might be different if the case were going forward on a joint recommendation, as to which counsel had inaccurately calculated parole eligibility, see, Little v. Allsbrook, supra, at 242 (Haynsworth, J., diss.); but see, Dodd v. Williams, 560 F. Supp. 372, 381 (N.D. Ga. 1983), or if the attorney had falsely suggested to his client that the prosecutor had

promised to recommend a particular sentence, United States v. Becklean, 598 F. 2d 1122, 1125 (8th Cir. 1979) or the judge had promised to impose it, see, United States ex rel. LaFay v. Fritz, supra, at 303 (Feinberg, J., diss.).

Even taking Defendant's statement of reliance upon the attorney's advice as an allegation that the lawyer forced him to plead guilty, Defendant has not shown himself entitled to relief, Martinez v. United States, 411 F.Supp. 1352, 1355n. (D.N.J. 1976), aff'd without opn., 547 F.2d 1162 (3d Cir. 1977).

Reviewing the record, this Court concludes that allowing a plea-withdrawal on what amounted to no more than counsel's hope for a particular disposition would mean that "an accused may safely indulge in a plea

of guilty as a mere trial balloon to test the attitude of the trial judge, being reasonably secure that he can withdraw it without great difficulty, United States ex rel. LaFay v. Fritz, supra, at 302, quoting United States v. Weese, 145 F. 2d 135, 136, (2d Cir. 1944). A defendant "cannot be permitted to try the attitude of the court like a boy sticking his toe in the water and then withdraw it if he finds it not to his liking," Kinney v. United States, 391 F. 2d 901, 902 (1st Cir. 1968); Miles v. United States, 385 F.2d 541, 544 (10th Cir. 1967); see also, Annot., Withdrawal of Plea of Guilty or Nolo Contendere, after Sentence, under Rule 32(d) of Federal Rules of Criminal Procedure, 9 A.L.R. Fed. 309 (1971).

The question of prejudice to the government is equally conclusive against

Defendant. This, one must recall, was a plea entered after trial--a jury-waived trial--had gone on for several days. The Court heard substantial evidence which, coupled with the plea colloquy, has understandably resulted in formation of an opinion as to the Defendant's guilt. Were Defendant permitted to withdraw his plea, the matter would necessarily have to go before another judge for a trial ab initio or--perhaps depending upon counsel's assessment of that judge--a new plea. The opportunity for judge-shopping, combined with the unfairness to the victim and the other witnesses who have already testified, means that Defendant has not met his burden.

ORDER

Accordingly, it is Ordered, that the Motion to Revoke Defendant's Guilty Pleas and Order New Trial be, and the same hereby is, Denied.

Hiller B. Zobel

Dated: August 18, 1986.

Filed in the office of the
Clerk of Courts for the County of
Middlesex
August 18, 1986
Edward J. Sullivan
Clerk.

wide latitude in this particular case, and I'm asking the Court for it's mercy, and this one time, I really feel this is an individual that does deserve mercy. He didn't show mercy to Kathleen Tennihan on th night on question, there's no question about that, Judge, but Mr. Ellis' readily admitted at all times what he did. He's remorseful about it. I suggest to the Court that probation is not out of line. I would have --I-- hopefully, the Court knows me better--get up and make a particular recommendation if I didn't earnestely feel my client deserved probation, and I'm asking the Court for that chance for Mr. Ellis. I'm asking the Court for probation. Thank you.

THE COURT: Thank you.

THE COURT: Mr. Ellis wish to

address the Court?

THE DEFENDANT: I don't think so, your Honor. Thank you.

THE COURT: Well, I'll explain what I'm going to do, and then Mr. Shell will impose the sentence.

I remember this case very well. It was and procedurally is somewhat unusual in that the trial proceeded, a number of witness, including the victim, testified, and the Court had a considerably more vivid account of the events than would otherwise have come from the ordinary reading of the police report, which is what normally accompanies a plea. I saw the photographs, and then the matter was terminated by the plea.

I have to say that I am unable to come up with any rational explanation, under any circumstances, that would

account for the actions of Mr. Ellis. The belief that the victim had stolen his money was the least irrational action that he took. There is a vast difference between accusing somebody of stealing something and proceeding after establishing to any reasonable person's understanding that the individual doesn't have the money, and then going on to inflict brutal beating. His actions in requiring her to strip and in searching her body cavities certainly don't merit any excuse, but at least at that point, any reasonable person would have been persuaded that whatever happened to the money she didn't have it.

The fact that the money was discovered by a police officer within a few moment of entering the apartment seems to emphasize the terrible

viciousness of what Mr. Ellis did. Now, it may be this was the one burst of violence in Mr. Ellis' life, but this Court form time to time sees people who commit murder, is the sole violent act in the person's life, and it's an act that has dreadfull consequences, for the victim, for the defendant. So I am regarding this as an act which requires serious punishment. I think the Commonwealth's recommendation is not inappropriate. I'm going to accept it with some modification.

I'm going to impose on the assault with intent to murder, nine to ten years Cedar Junction. On the assault and battery with a dangerous weapon, an on the indecent assault and battr, three to five years Cedar Junction on and after. It's my understanding that the defendant will be parole eligible in eight years.

Mr. Shell, impose the sentence.

THE CLERK: John E. Ellis, on indictment 85-2515, you will hearken to the sentence the Court has awarded against you, the Court having duly considered your offense. It is ordered by the Court you be punished by confinement at the Massachusetts Correctional institute at Cedar Junction for a period not exceeding ten years, nor less than nine years.

One indictment numbers 85-2514 and -16, you will hearken to the sentence the Court has awarded against you, the Court having duly considered your offenses. It is order by the Court you be punished by confinement at the Massachusetts correctional

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-1762

JOHN E. ELLIS,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

JAMES M. SHANNON
Attorney General

Michael W. Dingle*
Robert M. Mencillo
Assistant Attorneys General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

*Counsel of Record

TABLE OF AUTHORITIES

Cases

Statutes

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Other

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Respondent, the Commonwealth of Massachusetts, respectfully requests this Court to deny the petition for writ of certiorari, seeking review of the February 3, 1988 decision of the Appeals Court for the Commonwealth of Massachusetts.

REASONS WHY THE PETITION SHOULD BE DENIED.

This Court Does Not Have Jurisdiction To Review The Decision Of The Appeals Court Of The Commonwealth of Massachusetts Because It Is Not A Final Judgment Rendered By The Highest Court Of The Commonwealth.

The petitioner requests this Court to review the February 3, 1988 judgment of the Appeals Court for the Commonwealth of Massachusetts in Commonwealth v. John E. Ellis. (Appendix, 1a-6a; 25 Mass. App. Ct. 1101 (1988)). After that judgment was rendered, petitioner had twenty (20) days to file, under Rule 27.1(a) of the Massachusetts Rules of Appellate Procedure, an application for leave to obtain further appellate review of the case by the full Supreme Judicial Court of the Commonwealth of Massachusetts. Rule 27.1(a) provides:

> Within twenty days after the date of the rescript of the Appeals Court

> any party to the appeal may file an application to obtain further appellate review of the case by the full Supreme Judicial Court. Such application shall be founded upon substantial reasons affecting the public interest or the interests of justice. Oral argument in support of an application shall not be permitted except by order of the court.

Rule 27.1(a) regulates an Appellate Court party's right to seek further appellate review under Mass. Gen. Laws ch. 211A, §11, which provides:

> There shall be no further appellate review by the supreme judicial court of any matter within the jurisdiction of the appeals court which has been decided by the court, except: - (a) where a majority of the justices of the appeals court deciding the case, or of the appeals court as a whole, certifies that the public interest or the interests of justice make desirable a further appellate review, or (b) where leave to obtain further appellate review or late review is specifically authorized by three justices of the supreme judicial court for substantial reasons affecting the public interest or the interests of justice. Upon the written order of a majority of the justices of the appeals court, the decision of a

> panel of the appeals court may be reviewed and revised by a majority of the justices of the appeals court. Such a review shall not be a condition precedent to obtaining further appellate review by the supreme judicial court."

Petitioner did not file such an application: his jurisdictional statement does not state that he did (Pet. at 2), and his counsel has admitted to respondent's counsel that no such application was filed.

By failing to seek further appellate review in the Supreme Judicial Court, the petition comes before this Court in violation of 28 U.S.C. § 1257, because petitioner did not seek to have the Appeals Court decision reviewed "by the highest court of a State in which a decision could be had." Thus, this Court does not have jurisdiction to review the decision of the Appeals Court. Banks v. California, 395 U.S.

708 (1969) (petition for certiorari to California Court of Appeal dismissed for want of jurisdiction because petitioner had not asked California Supreme Court to review judgment, and thus decision was not a final judgment rendered by highest court of state); Stratton v. Stratton, 329 U.S. 55, 56-57 (1915) (a judgment rendered by an intermediate appellate state court cannot be reviewed by the United States Supreme Court where the highest appellate court in the state had discretionary power to review the judgment and no effort was made by the defeated party to get that court to exercise such power); Fisher v. Perkins, 122 U.S. 522, 525 (1887) ("This Court has no power to review any other judgments of the courts of a state than those of the highest court 'in which a decision in the suit could be had'").

Moreover, in an official opinion, the Attorney General of the Commonwealth has determined that a losing party in the Appeals Court must seek further appellate review in the Supreme Judicial Court before applying for review in this Court under 28 U.S.C. §1257:

> "Under this provision, if the jurisdiction of the Supreme Judicial Court is properly invoked and it declines to review the judgment of the Appeals Court, the Appeals Court is then the highest court in which a decision could be had. A party would then be free to appeal that decision to the United States Supreme Court. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Rock, 279 U.S. 410; Prudential Ins. Co. of America v. Cheek, 259 U.S. 530."

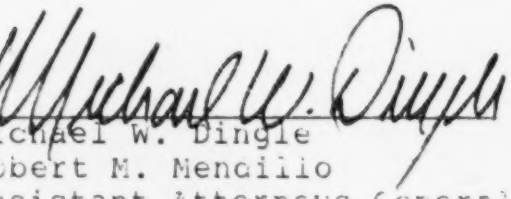
1973 Mass. Att'y Gen. Ann. Rep. 56, 56.

CONCLUSION

For these reasons, the petition for writ of certiorari should be dismissed for want of jurisdiction.

Respectfully submitted,

JAMES M. SHANNON
Attorney General



Michael W. Dingle
Robert M. Mendillo
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

Date: June 16, 1988